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**SECRETARY, BOARD OF  
OIL, GAS & MINING**

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**BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH**

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UTAH CHAPTER OF THE SIERRA CLUB,  
et al.,

Petitioners,

Docket No. 2009-019  
Cause No. C/025/0005

DIVISION OF OIL, GAS AND MINING,

Respondent, and

ALTON COAL DEVELOPMENT, LLC, and  
KANE COUNTY, UTAH,

Intervenors-Respondents.

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**APPLICATION FOR TEMPORARY RELIEF**

Pursuant to Utah Admin. Code § 645-300-212.200 through 212.240, and in anticipation of the requirements of Utah Code § 63G-4-405, Utah Chapter of the Sierra Club ("Sierra Club"), Southern Utah Wilderness Alliance ("SUWA"), Natural Resources Defense Council ("NRDC"), and

National Park Conservation Association (“NPCA”)(collectively, “Petitioners”) respectfully apply to this Board for temporary relief from the decision of Utah Division of Oil, Gas & Mining (“the Division”) to approve the application of Alton Coal Development, LLC, (“ACD”) for a permit to conduct surface coal mining and reclamation operations in an area known as “Coal Hollow,” south of the town of Alton in Kane County, Utah. Petitioners have received notice that the Division of Air Quality will approve ACD’s separate permit application pending before that agency, thus satisfying the sole remaining external condition on the Division’s approval of ACD’s permit to conduct surface coal mining and reclamation operations. For that reason, temporary relief from the Division’s decision has become necessary for the first time in these proceedings. Petitioners are entitled to temporary relief from the Division’s decision, and they will be entitled to temporary relief from this Board’s anticipated final order affirming the Division’s decision and formally issuing the requested mining permit to ACD, because:

- (1) by service of this application as certified below, all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;
- (2) through the arguments set forth in their post-hearing briefs and in their objections to the findings of fact and conclusions of law that the Division and ACD have filed at this Board’s direction, Petitioners have shown that there is a substantial likelihood that they will prevail on the merits of the final determination of the proceeding, namely, Petitioners’ anticipated appeal to the Supreme Court of Utah;
- (3) because the requested grant of temporary relief would preserve the *status quo* prior to any disturbance of land within the permit area or, alternatively, prior to further disturbance of land within the permit area beyond that which may have occurred at the time the Board acts on this application, the relief requested will not adversely

affect the public health or safety, or cause significant, imminent environmental harm to land, air, or water resources; and

- (4) the relief sought is not the issuance of a permit where a permit has been denied, in whole or in part, by the Division.

In the following paragraphs, Petitioners address each of the foregoing points.

## **I.**

### **Notice to All Other Parties to This Proceeding**

Simultaneously with the filing of this application, Petitioners serve a copy on each other party to this proceeding by electronic means and by U.S. Mail. Petitioners do not request oral argument on this application (although they would, of course, appear and present oral argument at the direction of this Board). Consequently, other parties now have an opportunity to be heard on this application by responding to it in writing, by requesting oral argument, or both.

Petitioners urge the Board to set a reasonable but expedited schedule for response to this application because, as the Board has made clear in its initial order disposing of the issues in this proceeding, it is unlikely that this Board will conclude that Petitioners have shown a substantial likelihood that they will prevail on the merits. Consequently, it is unlikely that this Board will grant this application, which Petitioners file as a required first step to requesting a stay pending appeal following issuance of the Board's final order. Simply put, neither the Division nor ACD require a lengthy period of time to respond to this application. However, Petitioners' interest in preserving the *status quo* prior to mining, and the interests of justice generally, require a decision on this application soon enough to enable Petitioners to seek a stay pending appeal from the Supreme Court of Utah. Accordingly, Petitioners urge the Board to require the Division and ACD to respond to this motion expeditiously, in no more than five business days from the date on which Petitioners file it.

## II.

### **The Petitioners Have Shown a Substantial Likelihood That They Will Prevail on the Merits**

In their post-hearing briefs Petitioners identified numerous shortcomings in ACD's permit application, together with a host of errors that the Division made in approving it. Petitioners supported each of their claims with citations to the administrative record, transcripts of the evidentiary hearing before this Board, and pertinent statutes, regulations, and case law.

Although this Board has indicated that it intends to reject Petitioners' claims *in toto*, the rationale for that result as stated in the Board's initial order on disposition of claims and in the findings of fact and conclusions of law that the Division and ACD have filed at the Board's direction simply repeats the Division's mistakes of fact and errors of law in approving ACD's permit application in the first place. To date the Board has failed to address much, if not all, of the factual evidence on which Petitioners' arguments rest. At every turn, the Board has construed the Utah state regulatory program conversely to Petitioners' well-supported interpretations of the law, and the Board has done so largely without citation to supporting legal authority.

Because Petitioners' claims rest upon superior legal authorities and factual assertions that the record fully supports, and because the Board's anticipated findings of fact to the contrary lack support of substantial evidence in the record taken as a whole or are based on unjustified deference to expert opinion of witnesses for the Division and ACD, Petitioners' post-hearing briefs and objections to the proposed findings of fact and conclusions of law show that Petitioners have a substantial likelihood of success on the merits of their intended appeal of the Board's anticipated final order. During the course of these proceedings, Petitioners have briefed the issue of deference and the merits of their claims. Additionally, Petitioners have filed objections to proposed findings of fact and conclusions of law which the Division and ACD have submitted at the Board's direction.

To avoid belaboring matters, Petitioners respectfully refer the Board to Petitioners' previously filed briefs and objections, which they incorporate here by reference. Petitioners rely upon the arguments and explanations of error in those pleadings as their demonstration of substantial likelihood of success on the merits in this proceeding.

### III.

**The Relief Requested In This Application Will Not Adversely Affect  
the Public Health or Safety, or Cause Significant, Imminent Environmental Harm  
to Land, Air, or Water Resources**

Petitioners request relief that would forestall the commencement of surface coal mining and reclamation operations in Coal Hollow until this proceeding is finally decided, either on appeal or on remand following judicial review. The relief that Petitioners request would preserve the *status quo* prior to any disturbance of land, air, or water resources as a result of ACD's operations. The record contains no evidence indicating that forestalling the commencement of surface coal mining and reclamation operations pursuant to ACD's permit would adversely affect the public health or safety or cause significant, imminent environmental harm, nor could preserving the *status quo* prior to mining possibly do so.

### IV.

**Petitioners Do Not Seek Temporary Relief from a Decision to Deny ACD's Permit**

The Board has indicated that it intends to affirm the Division's approval of ACD's permit application and to issue, formally, ACD's mining permit. For this reason, the temporary relief that Petitioners request would not stay an agency decision to deny ACD's permit. Moreover, if the Board were to deny ACD's permit, Petitioners would withdraw this application for temporary relief.

### Conclusion

For the reasons stated above and in Petitioners' post-hearing briefs and objections to proposed findings of fact and conclusions of law, Petitioners request that the Board grant them temporary relief from the Division's decision to approve ACD's permit application or, alternatively, from the Board's final order affirming that decision. Petitioners further request that the Board provide that such relief remain effective until the final disposition of the issues raised in this proceeding, whether on appeal or on remand following judicial review.

**Dated: November 15, 2010**

Respectfully submitted,

By:



Attorneys for Utah Chapter of the  
Sierra Club, *et al.*

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### CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of November, 2010, I served a true and correct copy of the foregoing **Application for Temporary Relief** to each of the following persons via e-mail transmission and United States first-class mail, postage pre-paid:

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